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December 17, 2003

Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

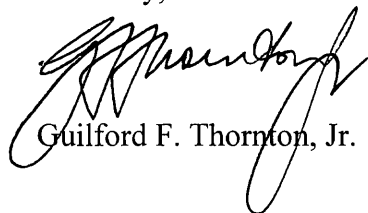
RE: Complaint of Ben Lomand Communications, Inc. Against Citizens
Telecommunications Company of Tennessee, LLC.
Docket No. 02-01221

Dear Chairman Tate:

I am enclosing with this letter Citizens Telecommunications Company of Tennessee, LLC's ("Citizens") response to the motion filed by Ben Lomand Communications, Inc. ("BLC") on December 12, 2003 in the above referenced case. A copy is being served on opposing counsel.

Should you have any questions or require anything further at this time, please do not hesitate to contact me.

Sincerely,



Guilford F. Thornton, Jr.

cc: H. LaDon Baltimore
Mike Swatts
Gregg Sayre

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)	
)	
COMPLAINT OF BEN LOMAND COMMUNICATIONS, INC.)	
)	
Against)	DOCKET NO. 02-01221
)	
CITIZENS TELECOMMUNICATIONS COMPANY OF TENNESSEE, LLC d/b/a FRONTIER COMMUNICATIONS OF TENNESSEE)))))	

**RESPONSE TO BEN LOMAND COMMUNICATIONS, INC.'s
MOTION TO COMPEL RESPONSES TO ITS DISCOVERY REQUESTS**

Citizens Telecommunications Company of Tennessee, LLC ("Citizens") respectfully submits this response to the Third Motion to Compel filed by Ben Lomand Communications, Inc. ("BLC") on December 12, 2003.

INTRODUCTION AND FACTUAL BACKGROUND

BLC initiated this case on November 7, 2002. BLC's complaint challenges a tariff Citizens filed on April 11, 2002 that was subsequently approved by the TRA, (the "April 11 Tariff") under which Citizens offers tariffed term discounts to its business customers in McMinnville and Sparta, Tennessee. BLC is the wholly owned subsidiary of Ben Lomand Rural Telephone Cooperative ("Ben Lomand"), and BLC competes with Citizens in McMinnville and Sparta.

The TRA has noted in several dockets recently, including this case, that Citizens faces stiff competition from BLC in McMinnville and Sparta. Accordingly the TRA has found that Citizens is entitled to offer pricing and incentives to its customers in McMinnville and Sparta that differ from those offered in other exchanges. *See* TRA Docket Number 00-00965, (TRA approved a tariff filing by Citizens that established a lower Automatic Access Line (“AAL”) rate for business customers in McMinnville and Sparta than Citizens charges customers in its other Tennessee exchanges.); TRA Docket Number 00-00963 (TRA approved a special promotion that waived installation charges for customers specifically in McMinnville and Sparta.); and TRA Docket No. 02-00088 (TRA approved a special promotion that waived installation charges for customers specifically in McMinnville and Sparta over the objection of the Consumer Advocate and Protection Division of the Tennessee Attorney General).

The TRA previously approved the April 11 Tariff after seeking and obtaining additional information from Citizens justifying its prices offered in the tariff. Nevertheless, six months later, BLC filed this action and alleges that Citizens’ term discounts to customers in McMinnville and Sparta are (a) unlawfully discriminatory, (b) unlawful special contracts and (c) unlawfully predatory under T.C.A. § 65-5-208(c)

In response to a motion to dismiss filed by Citizens in this matter, the TRA at its January 27, 2003 conference ruled that this case would proceed on the sole claim of whether the April 11 tariff reflected predatory pricing under T.C.A. § 65-5-208(c). Nevertheless, BLC served numerous discovery requests that seek information unrelated to its unsubstantiated claim of predatory pricing. Further, given the irrelevant nature of much of the information sought, it is unfair to burden Citizens with the cost of responding to such requests if BLC cannot even establish a *prima facie* case of predatory pricing.

ARGUMENT

I. Citizens Should Not Be Required To Respond To Interrogatories Numbered 9-11 and 16 In BLC's First Set of Discovery and Data Request Number 1 In The Second Set Of Discovery Because The Information Is Completely Irrelevant To Whether Citizens Is Pricing Below Cost.

A. Discovery Is Limited To Whether Citizens' Pricing Is Below The Price Floor Set Forth In T.C.A. § 65-5-208(c).

The TRA has held that the only issue remaining in this case is whether Citizens' pricing in its April 11 Tariff is predatory. T.C.A. § 65-5-208 provides that the TRA "adopt other rules or issue orders to prohibit . . . predatory pricing . . ." T.C.A. § 65-5-208(c). The statute does not define "predatory pricing." However, that same paragraph of T.C.A. § 65-5-208(c) states that "an incumbent local exchange company shall adhere to a price floor for its competitive services subject to such determination as the authority shall make pursuant to § 65-5-207." *Id.* "The price floor shall equal the incumbent local exchange company's tariffed rates for essential elements utilized by competing telecommunications providers plus the total long-run incremental cost of the competitive elements of the service." *Id.* Based on the foregoing, Citizens objected to all discovery requests that seek information that does not relate to whether or not Citizens' pricing is below the price floor.

T.C.A. § 65-5-208(c)'s price floor makes no reference to Citizens' pricing in other states or exchanges as referenced in Interrogatories numbered 9-11 and 16 in the First Set of Interrogatories or revenues from business versus residential customers as requested in Data Request number 1 in the Second Set of Discovery.¹

¹ Contrary to BLC's assertion, Citizens also objected to Data Request number 1 in the Second Set of Discovery "because it seeks information that is not relevant to these proceedings or likely to lead to the discovery of relevant evidence. Further, providing a breakout of business revenues from the total local revenues for the Citizens operating entity has no bearing on how rates were set in McMinnville and Sparta, which is the issue at hand."

It is also worth noting that Citizens has recently filed a petition for exemption under T.C.A. § 65-5-208(c) because it is losing business despite its business flat rate term discounts and other incentives offered only in McMinnville and Sparta.² It is no secret that Citizens has offered these incentives only to customers in McMinnville and Sparta because of the competition from BLC. Thus, Citizens has provided BLC with adequate responses to its discovery requests.

B. In The Event The TRA Wishes To Apply A Sherman Act Analysis To “Predatory Pricing,” Discovery Should Be Limited To Whether The Pricing Is Below The Statutory Price Floor, And All Further Discovery Should Be Stayed Until The TRA Issues A Finding In That Regard.

BLC has consistently suggested that the TRA should consider other factors beyond pricing below cost without referencing any legal authority for such position. Arguably, BLC is seeking to apply a Sherman Act, Section Two analysis to its claim. However, the United States Supreme Court has noted, “predatory pricing schemes are rarely tried, and even more rarely successful.” *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589, 97 S.Ct. 1348, 1357, 89 L.Ed.2d 538 (1986). Appropriately, the TRA has stated that a party complaining of predatory pricing “must allege with specificity the action by the telecommunications service provider that appears to be in violation of said prohibitions or the complaint is subject to dismissal.” TRA Rule 1220-4-8-.09(2)(b). BLC’s complaint is devoid of specificity. However, the TRA allowed its predatory pricing claim to proceed.

According to courts’ considering monopolization and/or attempts to monopolize through predatory pricing under the Section Two of the Sherman Act, “[a] plaintiff cannot prevail on a

² Since BLC has entered these markets, Citizens lost over 73% of residence lines and 65% of business lines in McMinnville since 1999 and 61% of residence and 44% of business in Sparta since 4th quarter 2000. (The loss is actually more because Citizens has not factored in the normal access line gain that it would normally have experienced absent competition). Assuming that Citizens had 100% of the market before BLC’s entry, it is readily apparent that it no longer has monopoly power or poses a dangerous probability of actual monopolization.

predatory pricing claim unless it proves that the prices it complains of are below its competitor's costs." *C.B. Trucking, Inc. v. Waste Management, Inc.*, 137 F.3d 41, 45 (1st Cir. 1998)(citing *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-26, 113 S.Ct. 2578, 2587-90, 125 L.Ed.2d 168 (1993)).

If the TRA is going to evaluate this matter according to the analysis applied to claims under Section Two of the Sherman Act, it should first require BLC to show below-cost pricing before allowing further discovery to proceed. BLC should be required to show that its case has some legal merit and basis in actual facts.

The United States Supreme Court has interpreted Section 2 of the Sherman Act to condemn predatory pricing when it poses "a dangerous probability of actual monopolization." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 884, 890, 113 S.Ct. 884, 890, 122 L.Ed.2d 247 (1993). Thus, in addition to showing pricing below cost, a plaintiff alleging predatory pricing must also show that the alleged predator has a "dangerous probability of recouping its investment in below-cost prices." *Brooke Group*, 509 U.S. at 225. This recoupment must take the form of "producing the intended effects on the firm's rivals, whether driving them from the market, or . . . causing them to raise their prices to supracompetitive levels within a disciplined oligarchy." *Id.* "This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will." *Id.*

"Even if circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the question whether [the pricing] would likely injure competition in the relevant market." *Id.* In this regard, the plaintiff "must demonstrate that there is a likelihood that the predatory scheme would cause a rise in prices above a competitive

level that would be sufficient to compensate for the amounts expended on predation.” *Id.* Furthermore, determining whether recoupment of predatory losses is likely “requires an estimate of the cost of predation and a close analysis of both the scheme alleged and conditions of the relevant market.” *Id.* at 226.

It is readily apparent that Citizens is not a monopolist, nor does its pricing pose a “dangerous probability of actual monopolization” in McMinnville or Sparta. Since BLC’s entry into these markets, Citizens has lost market share even after offering favorable incentives to customers in those cities. In fact, it appears that BLC may now have the dominant market share in those two cities. If BLC were to succeed in eliminating Citizens as a competitor, it would then obtain complete monopoly power in those cities.

As is evident from the above-cited authorities, there are many facts that are subject to discovery if the TRA were to apply a Sherman Act, Section Two analysis to this case. Based on the language of T.C.A. § 65-5-208(c), it does not appear that such analysis is appropriate under the circumstances alleged in this case. However, if such an analysis is applied, Citizens requests that (a) discovery be limited for the time being to issues relating to whether Citizens’ pricing at issue is below cost, and (b) in the event that BLC can establish that Citizens’ pricing at issue is below cost or the TRA otherwise allows discovery beyond the scope of whether Citizens is pricing below cost, Citizens be entitled to submit additional written discovery to relating to BLC’s financial strength and cost structures, market strategy and penetration, and relationship to Ben Lomand.

II. Citizens Should Not Be Required To Produce Records It Does Not Have.

In response to Data Requests Numbers 2 and 3 in BLC's Second Set of Discovery

Citizens stated as follows:

2. For the current month, year-to-date, and 12 months-to-date values indicated in Exhibit 1, page 1 of 5, line 5 denominated "Less: Uncollectibles" associated with operating revenue, indicate the amount (by either absolute value or as a percentage of the total) of uncollectibles associated with operating revenues derived from the "Local Network" category (line 1).

ANSWER:

Citizens objects to this request because it is overbroad and unduly burdensome. A breakout of Uncollectibles by amount or percentage of Local Network revenues is not something Citizens tracks in the ordinary course of its business.

3. For the current month, year-to-date, and 12 months-to-date values indicated in Exhibit 1, page 1, line 5 denominated "Less: Uncollectibles" associated with operating revenues, indicate the amount (by either absolute value or as a percentage of the total) of uncollectibles associated with operating revenues derived from business, rather than residential, customers.

ANSWER:

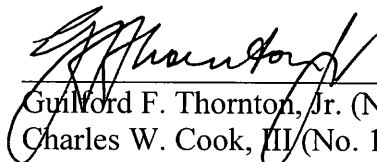
Citizens objects to this request because it is overbroad and unduly burdensome. A breakout of Uncollectibles by amount or percentage of business rather than residential revenues is not something Citizens tracks in the ordinary course of its business.

Citizens should not have to produce records it does not keep. Accordingly, Citizens has sufficiently answered these Data Requests.

CONCLUSION

For the reasons stated herein, Citizens requests that BLC's Third Motion to Compel be denied and/or that Citizens be awarded such additional relief as is appropriate.

Respectfully submitted,



Guilford F. Thornton, Jr. (No. 14508)

Charles W. Cook, III (No. 14274)

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*Attorneys for Citizens Telecommunications
Company of Tennessee*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on H. LaDon Baltimore, Farrar & Bates, LLP, 211 Seventh Avenue, N., Suite 420, Nashville, Tennessee 37219 by placing it in the U.S. Mail postage prepaid on this the 17th day of December, 2003.

